Filed 5/3/10 Santa Barbara Beach Club v. Freeman CA2/6

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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| SANTA BARBARA BEACH CLUB, LLC,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>BONNIE FREEMAN et al.,<br><br>Defendants and Respondents. | 2d Civil No. B212972<br>(Super. Ct. No. 1301247)<br>(Santa Barbara County) |

"Litigation which has come to be known as SLAPP is defined by the sociologists who coined the term as 'civil lawsuits . . . that are aimed at preventing citizens from exercising their political rights or punishing those who have done so.' [Citation.] The paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants' continued political or legal opposition to the developers' plans. . . . [¶] The favored causes of action in SLAPP suits are defamation, various business torts such as interference with prospective economic advantage [and] nuisance . . . ."[1] This case is yet another example.

[1] (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815-816, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 68, fn. 5.)

Appellant Santa Barbara Beach Club (Beach Club) sued some of the neighboring homeowners. The neighbors posted signs on their properties expressing their strong disagreement with Beach Club's efforts to sell fractional shares in a single family residence. Homeowners moved to strike the complaint as a SLAPP suit pursuant to Code of Civil Procedure section 425.16.[2] The trial court granted the motion, concluding that the causes of action in the complaint arose out of the homeowners' protected speech and plaintiff had not shown a probability of prevailing on the merits. On appeal, plaintiff contends the trial court erred because the signs are defamatory, not protected by the First Amendment, and interfere with its right to sell property. We affirm.

*STATEMENT OF FACTS AND PROCEDURAL HISTORY*

In 2007, appellant Beach Club remodeled and enlarged a single-family residence at 5277 Austin Road in Santa Barbara. The residence, now 6,600 square feet, is an ocean-front property on a bluff with unobstructed views of the Santa Barbara coast and Pacific Ocean. The property is in a subdivision that is governed by a declaration of conditions and restrictions (C&R's). One such restriction is that "[e]ach residential dwelling in the tract shall be designed, built, maintained and used for the primary purpose of a single family residence . . . ." The C&R's are administered by the More Mesa Shores Homeowners Association (Association).

In July 2007, respondents Bonnie and Fred Freeman, whose home is also located on Austin Road, learned that the Beach Club was advertising "fractional ownerships" in its property. Several neighborhood meetings were held to discuss the issue. The Association, which comprises approximately 100 homeowners, sent a letter to its County supervisor in September 2007 protesting the sales. The Association also sent letters to the Beach Club stating that selling fractional ownerships in the property would violate the C&R's. The Beach Club disagreed and continued its marketing efforts to sell six fractional shares in the residence for approximately $2 million each.

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[2] All statutory references are to the Code of Civil Procedure unless otherwise stated.

Several weeks later, the Freemans and several other residents of the neighborhood, including respondents Michael and Terry Fealy and Joan Myers (collectively "the homeowners"), posted two-foot by two-foot signs on the front lawns of their residences. Each sign states:

"Say No To:

Fractional Ownership

Timeshare Ownership

Beach Club Ownership

In Our More Mesa Shores Neighborhood."

The Beach Club threatened the homeowners with litigation if the signs were not removed. Several of the residents removed their signs. Freeman, Fealy and Myers did not.

On July 25, 2008, the Beach Club filed a first amended complaint for nuisance, slander of title, and interference with prospective economic advantage. The complaint seeks an injunction and damages and alleges that the signs are defamatory and have interfered with the Beach Club's "constitutional right to sell its property."[3]

The Freemans filed a motion to strike pursuant to section 425.16 in which the Fealys and Myers joined. The Beach Club filed opposition. After hearing, the trial court issued an order granting the motion.

On appeal, the Beach Club contends the homeowners have not met their burden of showing that the signs are speech protected by the First Amendment because they are defamatory, are not posted in a public forum, and do not concern an issue of public interest. It also asserts it has met its burden of showing a probability of prevailing on the merits because it has a "constitutional right to sell its property."

The Beach Club further contends that, if section 425.16 requires the court to accord a presumption of validity to the signs, it is unconstitutional. It asserts that the

[3] The complaint also contained two additional causes of action against the Fealys for enforcement of covenants and equitable servitudes. These causes of action are not at issue in this appeal.

court must engage in a weighing process balancing the competing constitutional rights of the parties, without according the signs a presumption of validity, in determining whether to grant or deny the motion to strike.

*DISCUSSION*

*Legal Principles*

A SLAPP suit (strategic lawsuit against public participation) is a lawsuit brought primarily to chill a party's constitutional right of petition or free speech. The anti-SLAPP statute was enacted to prevent and deter lawsuits that chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances and provides "an efficient procedural mechanism to obtain an early and inexpensive dismissal of nonmeritorious claims" arising from the exercise of those constitutional rights. (*Martinez v. Metabolife Intern., Inc.* (2003) 113 Cal.App.4th 181, 186.)

Section 425.16, subdivision (b)(1), states: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Section 425.16, subdivision (e), defines acts in furtherance of free speech or petition rights in connection with a public issue as follows: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; [or] (4) . . . any other conduct in

furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

*Standard of Review*

The consideration of an anti-SLAPP motion is a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67.) "If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Ibid.*) "The trial court's determination of each step is subject to de novo review on appeal." (*Martinez v. Metabolife Intern., Inc., supra,* 113 Cal.App.4th at p. 186.)

*The Anti-SLAPP Statute is Constitutional*

Beach Club asserts that, to the extent the anti-SLAPP statute "exalts one [constitutional] right over another," it is unconstitutional on its face. The premise is faulty and the claim fails. The statute does not exalt First Amendment rights over property rights. The statute merely establishes a procedure requiring a plaintiff who challenges the exercise of First Amendment rights to make an evidentiary showing at the outset of litigation that his complaint has substantive merit. Prior decisions have found no merit to similar constitutional challenges. (See, e.g., *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 866-867, superseded by statute on another point as explained in *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 478 [§ 425.16 does not violate constitutional rights to equal protection and jury trial]; *People v. Health Laboratories of North America, Inc.* (2001) 87 Cal.App.4th 442, 450-451 [exclusion of public prosecutors from § 425.16's motion procedure does not violate equal protection]; *Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 357-358 [§ 425.16 does not violate First Amendment or due process rights].)[4]

[4] The Beach Club relies on *Shelley v. Kraemer* (1948) 334 U.S. 1. That case involved the enforceability of a restrictive covenant barring homeowners from selling their property to

The Beach Club would have a substantially similar burden if the homeowners had filed a demurrer to the complaint or motion for summary judgment. Either of these procedures would require the Beach Club to establish the merit of its lawsuit before trial. Thus, section 425.16 imposes no greater or different burden on the Beach Club than traditional pretrial procedures.

At oral argument, the Beach Club asserted that the "first step" of the analysis requires that we measure the Beach Club's protected property rights against the homeowners' free speech rights. The claim is without merit. The first step is to determine whether "the challenged cause of action is one arising from protected activity." (*Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67.) The Beach Club's property rights become relevant during the second step of the analysis when the court determines whether plaintiff has demonstrated a probability of prevailing on the merits.

*The Signs Are Speech Protected by the First Amendment*

A cause of action "arises from" protected activity if the act underlying the plaintiff's cause of action, or the act which forms the basis for it, was itself an act in furtherance of the right of petition or free speech. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) The homeowners' signs are a classic exercise of their right of free speech. (*City of Ladue v. Gilleo* (1994) 512 U.S. 43, 58.) Nonetheless, Beach Club asserts the signs are not entitled to First Amendment protection and do not fall within the ambit of section 425.16 because they are defamatory, the homeowners have not presented sufficient evidence interpreting the language of the signs, and the homeowners intend the signs to interfere with the Beach Club's right to sell its property. The Beach Club also asserts that section 425.16 does not apply because the signs were not posted in a public forum and do not concern a matter of public interest.

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"any person not of the Caucasian race." (*Id.* at pp. 4-5.) The Supreme Court held that enforcement of the clause by government authorities would violate the equal protection clause. The case is inapposite.

*The Signs Are Not Defamatory*

The Beach Club correctly asserts that not all speech is protected by the First Amendment. Speech which is defamatory is not entitled to First Amendment protection. (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1131.) "Defamation is an invasion of the interest in reputation." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645.) The tort involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage. (Civ. Code, §§ 45, 46; *Smith, supra,* at p. 645.) "It is an essential element of defamation that the publication be of a false statement of *fact* rather than opinion." (*Ringler Associates Inc. v. Maryland Cas. Co.* (2000) 80 Cal.App.4th 1165, 1181.)

In determining whether a publication is defamatory, """a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of the complaint for libelous publication according to its natural and popular construction." That is to say, the publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader.'" (*Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 688; see also *Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5-6 ["Whether a statement can reasonably be given any defamatory interpretation is a legal question that we must resolve by determining the sense or meaning of the statements, under all the circumstances attending the publication, according to the natural and popular construction which would be ascribed to them by the average reader"].)

In deciding whether a statement is defamatory, one must consider that which is explicitly stated as well as that which is insinuated or implied. (*Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 803.) A court examines the totality of the circumstances, beginning with the language of the statement itself and then considering the context in which the statement was made. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260-261.)

Among the circumstances to be considered is whether the statements were made in an adversarial setting. (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1401.) Statements made in a setting in which the audience may anticipate efforts to persuade others may well assume the character of opinion even when stated as a fact. (*Id.* at pp. 1401-1402; see also *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 601 ["what constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole"].)

Considering all of the circumstances, the signs are not defamatory. The signs were posted during a neighborhood controversy in an effort to persuade others. The phrase "Say No To," as well as the signs as a whole, express an opinion or point of view concerning an issue that is important to the homeowners. The phrases "Fractional Ownership," "Timeshare Ownership," "Beach Club Ownership," to the extent they are taken out of context, may be considered statements of fact. However, these words are not defamatory as a matter of law because they are true. The Beach Club advertised itself as offering "fractional ownerships." "Timeshare Ownership," in context, means the same as fractional ownership—several people owning divided shares in a residence. "Beach Club Ownership" does no more than identify the Beach Club property. "In Our More Mesa Shores Neighborhood" is simply a means of identifying the location of the controversy.

The Beach Club argues that the homeowners did not submit evidence of the meaning of the words in the signs and therefore have failed to meet their burden of proof. The argument fails. "[T]he defendant need not justify the literal truth of every word of the allegedly defamatory matter. It is sufficient if the defendant proves true the *substance* of the charge . . . ." (*Smith v. Maldonado, supra,* 72 Cal.App.4th at pp. 646-647.) The signs contain clear, simple language that requires no extrinsic evidence to aid in their interpretation. Nothing in the signs impugns the reputation of the Beach Club or insinuates that it is guilty of criminal conduct. The average reader does not have the legal sophistication to differentiate "fractional ownership" from "timeshare ownership" or the

knowledge of the regulatory framework applicable to time shares, and there is no possibility that the signs contain defamatory innuendo.

The Beach Club also argues that the signs are not entitled to First Amendment protection because they merely express a dislike of the Beach Club's sales efforts. This argument too is without merit. Defamation does not occur and First Amendment protection is not lost based on the motive of the speaker. (See *Campanelli v. Regents of University of California* (1996) 44 Cal.App.4th 572, 578 [statements of opinion, even if objectively unjustified or made in bad faith, cannot form the basis for a libel action]; *Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1051 [accord].)

*The Signs are in a Public Forum and Concern a Matter of Public Interest*

The Beach Club asserts that the signs are not speech subject to section 425.16 because the front lawn of the homeowners' properties is not a public forum and the signs do not concern a matter of public interest, but rather concern a private dispute among property owners and is targeted not at the public but only to potential purchasers. We disagree.

The resident's front lawn is a public forum for purposes of the First Amendment. (*City of Ladue v. Gilleo, supra,* 512 U.S. at p. 56 ["[d]isplaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else . . . . Precisely because of their location, such signs provide information about the identity of the 'speaker'"].) Moreover, it is now well established that the anti-SLAPP statute protects private conversations as well as those occurring in a public forum. (See, e.g., *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 897 ["Section 425.16 . . . governs even private communications, so long as they concern a public issue"]; see also *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1546 ["subdivision (e)(4) applies to private communications concerning issues of public interest"].)

"The 'public interest' component of section 425.16, subdivision (e)(3) and (4) is met when 'the statement or activity precipitating the claim involved a topic of widespread public interest,' and 'the statement . . . in some manner itself contribute[s] to

the public debate.'" (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1246.)

The signs concern a matter of public interest. There are approximately 100 households in the Association. It actively participated in the ongoing dispute concerning use of the Beach Club property by sending letters to its members, to the Beach Club and to its governmental representative concerning the Beach Club's use of its property. The dispute is of vital importance to each individual and the neighborhood as a whole. (*Damon v. Ocean Hills Journalism Club, supra*, 85 Cal.App.4th at p. 479; see also *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1468-1470 [letters from the homeowners association's lawyer to a member involved issues of public interest because they were part of an ongoing dispute whether the homeowners association was evenhandedly enforcing its architectural guidelines].) The manner in which the Beach Club uses its property is a matter of public interest and debate, the very type of debate that led the Legislature to enact the anti-SLAPP statute.

The homeowners' community is smaller than the groups involved in *Damon* and *Ruiz*. However, in light of the Legislature's express directive to broadly construe the anti-SLAPP statute to encourage continued public participation in matters of public significance (425.16, subd. (a)), we conclude that the signs fall within the ambit of section 425.16, subdivisions (e)(3) and (4), and that the homeowners met their threshold burden. (See *Nygard, Inc. v. Uusi-Kerttula, supra,* 159 Cal.App.4th at p. 1042 [the "cases and the legislative history that discusses them suggest that 'an issue of public interest' within the meaning of section 425.16, subdivision (e)(3) is *any issue in which the public is interested.* In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest"]; see also *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175 [speech concerning placement of battered women's shelter in neighborhood was speech concerning a public issue].)[5]

[5] The Beach Club attempts to distinguish *Averill* on the basis that, unlike the proposed shelter, the residence on its property already existed. The argument is based on a

*No Probability of Success on the Merits*

*Nuisance*

The Beach Club contends it has established a probability of prevailing on the merits of its nuisance cause of action because the signs are defamatory and are intended to interfere with the use of its property. We disagree.

Nuisance is defined as "[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway . . . ." (Civ. Code, § 3479.)

The Beach Club's mere assertion that the signs are a nuisance because they interfere with the comfortable enjoyment of its property by dissuading potential purchasers does not state a claim for nuisance. By definition, to constitute a nuisance, the interference with enjoyment of property must be caused by something "injurious to health," "indecent," "offensive to the senses" or be an obstruction to the use of the property. There is no evidence or argument that any of the signs physically obstructed the Beach Club's use of its property or were indecent. To recover under the remaining categories, "'. . . the injury must be *physical*, as distinguished from one purely *imaginative*; it must be something that produces real discomfort or annoyance through the medium of the senses, not from delicacy of taste or a refined fancy. . . .'" (*Dean v. Powell Undertaking Co.* (1921) 55 Cal.App. 545, 550; see also *Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 274-275 [recovery for nuisance requires a showing that the senses were offended].)

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misreading of *Averill*. In *Averill*, as here, the issue in controversy was a change in use of an existing residential property.

S*lander of Title*

The Beach Club asserts that it has stated a cause of action for slander of title because the signs disparage and impair the marketability of its property. It asserts potential purchasers will not buy a property that is embroiled in a neighborhood dispute.

Slander of title occurs when "'[o]ne who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land . . . under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as a purchaser or lessee thereof might be determined thereby . . . [and] pecuniary loss result[s] to the other from the impairment of vendibility thus caused.'" (*Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 857.)

The Beach Club failed to establish that the signs meet these requirements. As we have said, the signs do not contain a false statement of fact. (See, e.g., *Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 263-264, fn. omitted [defendant's statement must be "false, either knowingly so or made without regard to its truthfulness"].)

In addition, "[t]he cause of action for slander or disparagement of title requires that the defendant publish a direct or indirect disparagement of the title to real property. The disparaging statement may be any unfounded claim of an interest in real property that throws 'doubt' on its ownership. The disparagement or aspersion must cast a cloud on, or draw into question the right or extent of, the owner's title in the property." (5 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 11:43, p. 11-149, fns. omitted.) The signs do not challenge or threaten the Beach Club's ownership of or right to possess its property. The signs challenge only the Beach Club's use of the property. Therefore, the signs do not slander title as a matter of law. (See, e.g., *Niedert v. Rieger* (7th Cir. 1999) 200 F.3d 522, 528 [challenge to particular use of property rather than right to own or possess property does not constitute slander of title].)

*Interference with Prospective Economic Advantage*

The Beach Club asserts it has met its burden of establishing a claim for interference with prospective economic advantage. To succeed on a claim of interference

with prospective economic advantage a plaintiff must show (a) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff, (b) defendant's knowledge of the relationship, (c) intentional acts by the defendant designed to disrupt the relationship, (d) economic harm to the plaintiff proximately caused by the acts of defendant, and (e) conduct that was wrongful by some legal measure other than the fact of the interference itself. (*Della Pena v. Toyota Motor Sales* (1995) 11 Cal.4th 376, 392-393.)

Claims for interference with prospective economic advantage may not be based on speech that is entitled to constitutional protection. (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 848.) *Paradise Hills Associates v. Procel* (1991) 235 Cal.App.3d 1528, disapproved on another ground in *Kowis v. Howard* (1992) 3 Cal.4th 888, 898, is instructive. In that case, a developer sued a purchaser of one of its houses for interference with prospective economic advantage after the purchaser had publicly criticized the quality of the home and made public statements, including posting signs on her property, about her unhappiness with them. She also allegedly attempted to persuade prospective customers not to purchase homes in the development. The court held her speech was protected under the First Amendment and that the developer could not recover on the basis of interference with prospective economic advantage.

*CONCLUSION*

The facts of this case underscore the continuing wisdom of *Wilcox v. Superior Court, supra*, 27 Cal.App.4th at page 815. Residents of a community seeking to express their disagreement with what they perceive to be objectionable conduct by a fellow resident ought not be dissuaded by threat of litigation.

Accordingly, we affirm the order of the trial court. Respondents shall

recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Denise de Bellefeuille, Judge

Superior Court County of Santa Barbara

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